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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-first session (17 to 21 November 2014)

No. 49/2014 (China)

Communication addressed to the Government on 18 September 2014

concerning Messrs Jingling Tang, Qingying Wang and Xinting Yuan

The Government has not replied to the communication.

The State is not a party to the International Covenant on Civil and Political Rights.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47 and Corr.1, annex), the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in

the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. According to the source, Messrs Jingling Tang, Qingying Wang and Xinting Yuan are all active participants of the "Nonviolent Citizens' Disobedience Movement", reportedly a network of activists that advocate for reforms aimed at bringing about liberal democracy in China.

4. Mr Jingling Tang, born in 1971, is a Chinese national residing in Guangzhou, China. Since 2000, Mr Tang has practiced as a lawyer in Guangdong Province, China, and dealt with a variety of human rights defence cases. The source informs that, in recent years, police have allegedly detained, threatened and tortured Mr Tang as a result of his human rights activism. In 2006, Chinese authorities did not renew Mr Tang's attorney license as a consequence of his work on a local election recall case in Taishi, Guangdong Province. Since his disbarment, Mr Tang has worked as a "citizen agent" by providing legal assistance on human rights cases and collaborating on campaigns related to civil and political rights reforms. Mr Tang founded the Nonviolent Citizens' Disobedience Movement.

5. Mr Qingying Wang, born in 1982, is a Chinese national residing in Guangzhou. Mr Wang was previously a teacher at Guangdong University of Technology. Since 2006, he has been a pro-democracy activist while also supporting the actions of Mr Tang. The source informs that, in 2009, under pressure from local authorities, the University fired Mr Wang after he signed "Charter 08", a manifesto promoting political reform and democratization in China. In 2013, he participated actively in the Nonviolent Citizens' Disobedience Movement with Mr Tang and Mr Xinting Yuan. Mr Wang has often faced harassment and pressure from authorities owing to his human rights activism.

6. Mr Xinting Yuan (also known as Yuan Chaoyang), born in 1971, was previously an editor at the Guangzhou Press. The source informs that, in 2009, under pressure from local authorities, the company fired Mr Yuan after he signed Charter 08. Since 2013, Mr Yuan has participated actively in the Nonviolent Citizens' Disobedience Movement. In recent years, Mr Yuan has been pressured and harassed by national authorities for his human rights defence activities.

7. The source reports that, on 16 May 2014, Messrs Tang, Wang and Yuan were all arrested on criminal charges of suspicion of "creating a disturbance" and have been detained since. Following their arrest, they were all detained at Guangzhou Baiyun District Detention Centre and, on 19 June 2014, transferred to Guangzhou No. 1 Detention Centre, where they remain to date.

8. According to the source, Mr Tang was arrested at his home by police officers from the Baiyun District Branch of the Guangzhou Public Security Bureau. Earlier that day, the

police had presented a search warrant and a criminal detention notice issued by the Baiyun District branch of the Guangzhou Public Security Bureau, pursuant to article 80 of the Criminal Procedure Law of China, which regulates the initial detention of criminal suspects. They searched his residence and confiscated computers, cell phones and books.

9. The source reports that Mr Wang was arrested at his home by national security police officers from the Guangzhou Public Security Bureau. Together with police officers from the Baiyun District and Panyu District branches of the Guangzhou Public Security Bureau, and without presenting any warrant, they searched his home and confiscated laptop computers and cell phones. Mr Yuan was reportedly arrested at his home by police officers from the Guangzhou Public Security Bureau, who also did not present any warrant.

10. The source informs that, on 20 June 2014, Messrs Tang, Wang and Yuan were all formally charged by the Guangzhou Municipal People's Procuratorate with "inciting subversion of State power", pursuant to the provisions of article 105, paragraph 2, of the Criminal Law of China, which stipulates that those who incite others by spreading rumours or slanders or any other means to subvert the State power or overthrow the socialist system are to be sentenced to not more than five years of fixed-term imprisonment, and that the ringleaders and those who commit major crimes shall be sentenced to not less than five years of fixed-term imprisonment.

11. On 21 May 2014, Mr Tang's lawyer met with him at Baiyun District Detention Centre. Mr Tang reported that a discipline management officer had tried to force him to squat but he had refused, prompting the enraged officer to violently kick him. In addition, the Detention Centre had not allowed his family to send eye glasses to Mr Tang, even though he is severely near-sighted. His family has not been allowed to meet him since he was arrested.

12. On 23 May 2014, Mr Wang's lawyer met with him at Baiyun District Detention Centre and learned that his client had allegedly been tortured and mistreated. Reportedly, Mr Wang had been repeatedly slapped in the face by authorities for refusing to falsify evidence against Mr Tang and Mr Yuan. He had also been forced to work long hours and held in a 20-square-metre room with 30 other inmates and given very poor quality and inadequate food. Following his visit on 10 June 2014, the lawyer reported that Mr Wang had been interrogated at least 20 times, sometimes for as long as 12 to 13 hours at a time, until he confessed under duress. Since he confessed under duress, Mr Wang has reportedly received improved treatment and has been placed in a larger room and no longer beaten. Mr Wang's wife was reportedly also harassed and threatened by national security officers.

13. The source submits that the deprivation of liberty of Messrs Tang, Wang and Yuan is arbitrary and falls within category II of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it. The source claims that they, as active members of the Nonviolent Citizens' Disobedience Movement, have been detained solely on the basis of the peaceful exercise of their rights guaranteed under articles 19 and 20 of the Universal Declaration of Human Rights, namely, the right to freedom of opinion and of expression and the right to freedom of peaceful assembly.

14. The source further submits that the deprivation of liberty of Messrs Tang, Wang and Yuan also falls within category III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it. No arrest warrant was produced for the arrests of Mr Wang and Mr Yuan. In addition, the petitioners were not informed of the exact charges brought against them until four days after their arrest. They now face prosecution under a criminal charge that carries a more severe punishment than the one for which they were initially detained. Furthermore, Mr Wang's confessions were allegedly extracted under torture during his detention. The source argues that this constitutes a violation of articles 9, 10 and 11 of the Universal Declaration of Human Rights.

Response from the Government

15. The Working Group addressed a communication to the Government of China on 18 September 2014, requesting detailed information about the current situation of Messrs Tang, Wang and Yuan and a clarification of the legal provisions justifying their continued detention. The Working Group regrets that the Government has not responded to the allegations transmitted to it.

16. According to paragraph 15 of the Working Group's revised methods of work, a Government is requested to reply to a communication within 60 days from the date of its transmittal. However, in accordance with paragraph 16, the Working Group may grant a Government a further period of a maximum of one month in which to reply.

Discussion

17. Despite the absence of any information from the Government, the Working Group considers that it is in a position to render an opinion on the case on the basis of the submissions that have been made, in conformity with paragraph 16 of its revised methods of work.[1]

18. In the present case, the Government has chosen not to rebut the prima facie reliable allegations submitted by the source. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues.[2] If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the given allegations. Hence, the Working Group should base its opinion on the prima facie case made out by the source.

19. On 16 May 2014, Messrs Tang, Wang and Yuan were reportedly arrested in their respective homes by national security police officers from the Guangzhou Public Security Bureau. In particular, Mr Wang and Mr Yuan were not presented with any warrant by the arresting police officers and were not informed of the exact charges brought against them until four days after their arrest. The arrests of Mr Wang and Mr Yuan were, therefore, conducted in violation of article 9 of the Universal Declaration of Human Rights, which stipulates that no one shall be subjected to arbitrary arrest, detention or exile.

20. Furthermore, reportedly, although Messrs Tang, Wang and Yuan were arrested initially on criminal charges of suspicion of "creating a disturbance", they were all formally charged on 20 June 2014 by the Guangzhou Municipal People's Procuratorate with "inciting subversion of State power", pursuant to article 105, paragraph 2, of the Criminal Law of China, which would call for an immensely higher level of punishment when compared with the allegations made at the time of their arrest. Such a change of charges to the disadvantage of the accused also constitutes a clear violation of articles 9, 10 and 11 of the Universal Declaration of Human Rights.

21. Whereas article 10 of the Universal Declaration of Human Rights states that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him, article 11, paragraph 2 specifies that no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier

[1] See, for example, A/HRC/WGAD/2014/5, paras. 14 and 15.
[2] See, for example, A/HRC/19/57, para. 68.

penalty be imposed than the one that was applicable at the time the penal offence was committed.

22. Furthermore, the source reports that Mr Tang and Mr Wang were subjected to torture and ill-treatment in the detention centre. Mr Tang was violently kicked by a discipline officer and has not been allowed either to meet his family since the inception of his detention or to receive eye-glasses from them. The source also alleges that Mr Wang had been subjected to repeated torture and ill-treatment by the authorities, who forced him to falsify evidence against Mr Tang and Mr Yuan. It was only after he made false confessions that he received improved treatment. Such a practice of torture and ill-treatment is in clear violation of the international norms on the prohibition of torture, including article 5 of the Universal Declaration of Human Rights, which stipulates that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

23. The Working Group further notes that Messrs Tang, Wang and Yuan have been subjected to detention from 16 May 2014 to the present without trial. It is part of the well-established international law on detention that pretrial detention should be an exception and should be as short as possible. In its 2011 annual report, the Working Group also underlined that pretrial detention should be an exceptional measure.[3] The Working Group finds that the mismanagement of the criminal administration as evidenced by the practice of torture and ill-treatment, prolonged pretrial detention, and the change of charge to the effect of increasing the severity of sanction are of such gravity as to give the deprivation of liberty an arbitrary character, falling within category III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

24. The Working Group is also highly concerned by the fact that, as alleged by the source, Messrs Tang, Wang and Yuan, active members of the Nonviolent Citizens' Disobedience Movement, have been detained on the basis of the peaceful exercise of their rights guaranteed under articles 19 and 20 of the Universal Declaration of Human Rights, which provide for the right to freedom of opinion and of expression and the right to freedom of peaceful assembly. The deprivation of liberty of Messrs Tang, Wang and Yuan, in this context, is arbitrary and falls within category II of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

Disposition

25. In the light of the foregoing, the Working Group on Arbitrary Detention renders the following opinion:

(a) The deprivation of liberty of Messrs Tang, Wang and Yuan from 16 May 2014 to the present has been conducted as a result of their legitimate exercise of the rights or freedoms guaranteed by articles 19 and 20 of the Universal Declaration of Human Rights. It falls within category II of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it;

(b) The aforementioned deprivation of liberty is also in violation of articles 9, 10 and 11 of the Universal Declaration of Human Rights, falling within category III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

26. Consequent upon the Opinion rendered, the Working Group requests the Government of China to remedy the situation of Messrs Tang, Wang and Yuan and to bring

[3] See A/HRC/19/57, paras. 48-58.

it into conformity with the standards and principles set out in the Universal Declaration of Human Rights.

27. Taking into account all the circumstances of the case, the Working Group concludes that the adequate remedy would be to immediately release Messrs Tang, Wang and Yuan and to grant them reparation for the harm they have suffered during the period of their arbitrary detention.

28. In accordance with article 33 (a) of its revised methods of work (A/HRC/16/47 and Corr.1, annex), the Working Group considers it appropriate to refer the allegations of torture to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment for appropriate action.

[Adopted on 20 November 2014]